No. 10,127

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

And

UNITED STATES OF AMERICA,

Appellant,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee,

Appellees.

REPLY AND ANSWER

BRIEF OF THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee,

Appellants and Appellees.

ALAN G. PAINE,
H. E. T. HERMAN,
622 Spokane & Eastern Building,
Spokane, Washington.

Attorneys for The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, Appellants and Appellees.

POST, RUSSELL, DAVIS & PAINE,
Spokane, Washington
Of Counsel.

INLAND-AMERICAN PTG. CO.

INDEX OF SUBJECT MATTER

Page

Answer to Argument of United States, Appellant 11

Appendix 19

Conclusion 18

Reply to Answer of United States, Appellee..... 1

TABLE OF CASES CITED

Bethany Presbyterian Church v. Seattle, 154 Wash. 529, 282 Pac. 922.....11, 12

Continental Land Company vs. United States, 88 Fed. (2d) 104..... 3

Great Northern Railway Co. vs. Washington Electric Company, 197 Wash. 627, 86 Pac. (2d) 208. (1939)..... 2

Lewis Blue Point Oyster Cultivation Company vs. Briggs, 229 U. S. 82, 57 L. ed 1083, 33 S. Ct. 679, Ann. Cas. 1915-A 232..... 3

Magruder v. Supplee, Vol. 86 Law Edition Advance Opinions No. 15, p. 1025..... 16

Miller vs. United States, 125 Federal (2d) 75..... 8

Monongahela Navigation Co. vs. United States; 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622.....3, 5

Olson vs. United States, 292 U. S. 246, 78 L. ed. 1236, 54 S. Ct. 704.....5, 6, 10

W. A. Ross Const. Co. vs. Yearsley, 103 Fed. (2d) 589. (C.C.A. 8, 1939)..... 2

Scranton vs. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 S. Ct. 48..... 3

State ex rel Oregon-Washington Water Service Co., et al v. Hoquiam, 155 Wash. 678, 287 Pac. 670 15

United States v. Alabama, 313 U. S. 274, 85 L. ed. 1327, 61 S. Ct. 1011.....11, 15

United States vs. Chandler-Dunbar Water Power Co., 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667 ..... 1, 3, 4, 5

United States vs. C. M. & S. P. Railway Co., 312 U. S. 592, 85 L. ed. 1064, 61 S. Ct. 772 3

United States vs. Sponenbarger, 308 U. S. 266, 84 L. ed. 238, 60 S. Ct. 225 7

U. S. A. ex rel Ten. Valley Authority vs. Longmire (unreported) 8

STATUTES CITED

Remington Revised Statutes of Washington, Sec. 11243 (Laws of 1935, p. 68, Sec. 1) 11, 19

Remington Revised Statutes of Washington, Sec, 11265 (Laws of 1939, Ch. 206, Sec. 45, p. 766, Amending L. 1935, Ch. 30, Sec. 7) 12, 19

ARGUMENT IN REPLY TO THE GOVERNMENT'S ANSWER TO APPELLANT'S APPEAL

In answer to our brief on appeal, the Government raises no objections to the form or sufficiency of our offers of proof nor disputes the facts which those offers were submitted to prove. The Government's position is based on three premises stated as follows in its brief:

A. Appellant's property was valuable for power purposes only when utilized in conjunction with the flowing waters of the Columbia River.

B. Riparian rights, though valuable as between private claimants, may be destroyed by a federal improvement of navigation without the Government being liable for compensation.

C. Power site value of lands bordering on a navigable stream exists only in servitude to the Federal Government's navigation powers.

As to the Government's premise A, there is no dispute. It was so stipulated at the trial.

As to the Government's premise B, there is no dispute, where the right is destroyed by governmental action in changing the characteristics of the river, etc., provided no actual land be taken.

Appellant cites the case of *U. S. vs. Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667, but without any attempt to analyze it. We have discussed it in detail in our opening brief and

will not repeat that discussion here. The only cases not cited and discussed by us are *W. A. Ross Const. Co. vs. Yearsley,* 103 Fed. (2d), 589, (C.C.A. 8, 1939), *Great Northern Ry. Co., v. Washington Electric Co.,* 197 Wash. 627, 86 Pac. 2d 208, (1939).

W. A. Ross Const. Co. v. Yearsley, 103 Fed. (2d), 589, was not a condemnation suit but was a suit against a contractor for damages alleged to have resulted to plaintiff's land by washing away accretion land on the Missouri River as a result of the construction of dikes by the contractor for the United States in improvement of navigation on the Missouri. The court held such damages could not be recovered because they did not amout to a taking of property.

Great Northern Ry. Co. v. Washington Electric Co., 197 Wash. 627, 86 Pac. (2d) 208, was a dispute between a power company which had built a dam in the Columbia River under a Federal Power Commission license, and the railroad whose right of way embankment extended into the bed of the Columbia River. The court held that while the United States might not have to pay for damages to the railroad right of way, if it were improving navigation, since it was in the bed of the river, nevertheless its licensee, the Power Company, did under the terms of its license.

The fundamental error of the Government's position is in failing to distinguish between the actual taking of property and the impairment of riparian rights or values, which involve no taking of property. It is settled law that the Government may improve navigation on a navigable stream, even to the extent of

changing the course of the stream so that it actually no longer flows by the land it formerly did, without being responsible for damages. (*Scranton vs. Wheeler,* 179 U. S. 141, 45 L. ed. 126, 21 S. Ct. 48; and other cases cited in pages 74 and 75 of our opening brief, and in Note 4 of the United States of America's brief, on page 11.)

However, none of these cases involve the taking of uplands—but the most that can be said for these cases is that some involved structures actually in the bed of the navigable waters such as an oyster bed (*Lewis Bluepoint Cultivation Co. vs. Briggs,* 229 U. S. 82; 57 L. ed. 1083; 33 S. Ct. 679; Ann. case 1915, A. 232), or a railroad road bed (*U. S. vs. C. M. & St. P. Ry. Co.,* 312 U. S. 592, 85 L. ed. 1064, 61 S. Ct. 772). In those cases, the owner's structure was rendered valueless or he was required to remove it, but in cases where the government actually took property, the courts have compelled the United States to pay for it. See *Monongahela Navigation Co. vs. United States,* 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622.

In all the cases cited, where the actual taking of land was involved, the Government has had to pay the fair market value, and no more,—(*The Continental Land Co. case,* 88 Fed. (2d) 104, and the *Chandler-Dunbar case,* 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667 are examples),—but in no case cited has the United States paid less than the fair market value, because the taker was the Government and was going to use the land for some purpose connected with the improvement of navigation.

Let us examine the question of uplands, bordering navigable waters. Such lands may not be suited for power purposes but their value is often increased by their proximity to the water, maybe as a summer resort, or a home site, a canal site, or even a farm which is more desirable because it borders a river as compared with one of identical soil characteristics that does not. Such values may lawfully be diminished by changes in the river bed itself when the United States improves navigation, but *if the land is condemned,* the value is recognized.

Again we point out the treatment of this value in *U. S. vs. Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667, in that portion of the opinion dealing with canal site value. The appellee's brief deals with this only in a foot-note on page 14, when it says:

> "Appellant seems to find some comfort (Br. 108-114) in another portion of the opinion in the Chandler-Dunbar case holding that the power company was entitled to compensation based upon the availability of its upland for canal and lock purposes (p. 77). But that statement is not pertinent, since the building of the canals 'around the stream' (p. 66), for watercraft to pass 'around the falls and rapids in the river' (p. 67), did not require the erection of any structure in the river nor the utilization of any riparian rights impressed with a navigation servitude. The Supreme Court quite properly held that for those 'portage' values the company was entitled to compensation."

It is to be noted that "portage value" is a phrase of appellee's coinage. It does not appear in the opin-

ion. How, again we ask, can land be used for a canal without the diversion of the waters of the navigable stream thru the canal? If the owner can divert some water in order to pass ships "around the falls and rapids of the river," how much can he divert? Such lock sites might lawfully be rendered valueless by the Government forbidding such use of the water or by the erection of dikes or walls or other structures in the bed of the river, that would make such diversion impossible, but when the land itself is appropriated the 5th Amendment says that compensation for such value must be made. (*U. S. vs. Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667; *Monongahela Nav. Co. vs. U. S.,* 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622). Appellee fails entirely to comment on the case of *Olson vs. U. S.* 292 U. S. 246, 78 L. ed. 1236, 54 S. Ct. 704 discussed at length in our brief on pages 87 to 91 inclusive. This case involved the navigable body of water known as the Lake of the Woods. The Government was raising the level of the lake in conjunction with the Canadian Government. The land owners sought additional values for their land for reservoir purposes. This was disallowed not on the ground that the improvement was one in aid of navigation but on the ground that there was no reasonable likelihood of the creation of a reservoir by anyone but the Government, and that the land had no increased market value; i. e., increased value between private parties. However, increased values were allowed because of the value of the lands as fishing resorts, summer resorts, docking places for boats, etc., —all of which values were dependent upon the use of

the waters of the Lake of the Woods in conjunction with the lands.

> "The court suggested that petitioner Olson's lands might be used for fishing purposes and instructed the jury, if it so found, to 'add to the value which it might have for agricultural purposes, any added value which might accrue to it, because of its usefulness as a fishing station.'" (*Olson vs. U. S.* 292 U. S. 254, 78 L. ed. 1244).

While it may seem inequitable, we think it correct to say that the Government might have drained the Lake of the Woods, or greatly lowered its level, and destroyed these values, without the necessity of paying for them, because there would be no "taking" of the land within the meaning of that word as used in the Constitution.

In cases where the government was sued for damages to property adjacent to streams or other bodies of water resulting consequentially from its exercise of the power to improve navigation, the courts have held there was no liability for such incidental damages occurring to lands adjacent to the bodies of water altered in aid of navigation, because the government was engaged in a lawful undertaking. In all cases where the government condemned lands it has been required to pay for all property actually taken, on the same basis as any other purchaser.

When consequential damage occurred to adjacent property incidental to the improvement of the bodies of water such consequential damage occurred as the result of the Federal Government exercising a right expressly conferred by the commerce clause of the

Constitution and such damage was in fact a form of *damnum absque injuria.* On the other hand the taking of property by the government in a condemnation proceeding can only be accomplished subject to the limitations placed upon the Sovereign by the last clause of the Fifth Amendment to the United States Constitution: "nor shall private property be taken for public use without just compensation."

In this connection it is well to bear in mind the words of Mr. Justice Black speaking for the Supreme Court of the United States: "The Constitutional prohibition against uncompensated taking of private property for public use is founded upon a conception of the injustice in favoring the public as against an individual property owner." *U. S. vs. Sponenbarger,* 308 U. S. 266, 84 L. ed. 238, 60 S. Ct. 225.

The crux of this whole case is reached in the Appellee's Point C—"Power site value of lands bordering on a navigable stream exists only in servitude to the Federal Government's navigation powers." This statement in itself is misleading. It is true, as we have said, that these values might be destroyed by dredging the channel of the river, for instance, when the lands themselves were not taken, and the consequential damage would be *damnum absque injuria,*—but the proposition as stated by Counsel for the United States is too broad if it is meant that the Government can condemn these lands and ignore their fair market value. Here, again, the only case relied upon to sustain the Government's contention, besides the Chandler-Dunbar case and the Continental Land Co.

case, is the unreported case of *U. S. A. ex rel. Tennessee Valley Authority vs. Longmire,* printed in the Appendix. It is impossible to tell from this opinion what the facts were. Apparently a substantial sum ($55,000) was allowed for a dam site. So far as can be determined from the opinion $55,000.00 was all that the market value justified, and any additional sum sought was merely a "hyopthetical additional value" as discussed in the Chandler-Dunbar case supra or "inherent adaptability" (Continental Land case).

In citing *Miller vs. U. S.,* 125 Fed. (2d) 75, we feel sure the attorney writing the Government's brief had his tongue in his cheek. In the first place, he admits he believes the case is wrongly decided and is now in the Supreme Court with the Government seeking its reversal, but passing this, the argument he seeks to draw from this case is on its face unsound. The Government's brief says (page 17):

> "Applying that principle in this case, it is evident that appellant's dam site at Kettle Falls did not in fact have any power value at the time of the taking in December of 1939. With the definite authorization of the Columbia Basin Project by Act of Congress in 1935—four years before this condemnation suit was begun—the dam sites upstream ceased to have any value for power purposes."

This applies equally to all land in the reservoir. What about the Town of Kettle Falls, the farms, the mill sites? Did not every purchaser know that crops could no longer be grown on the farms, that buildings and businesses could not be maintained in a town 50 feet under water? Who would buy a saw mill that in

a few months would be under 100 feet of water? Surely we have not reached the day when the Government is asking its courts to declare that the United States can announce that it is going to condemn privately owned property, and then say that since all purchasers must know they cannot use that property except in the brief interval until condemnation is started, that therefore there will be no purchasers, and the property has lost its market value.

But further analysis of the Miller case shows it is not susceptible to any such perversion. The question involved was the value of land to be used for the relocation of the Southern Pacific Railroad, necessitated by the flooding of the old right of way by the Shasta Project. The land involved was not an essential part of the Shasta Project, as there were several alternative routes for the railroad. The court held that the route was not definitely determined until the condemnation suit was commenced, and that the value of the land should be determined as of that date, and sales of similar land could be shown. Similar land was land adjacent to the right of way and had had some increase in market value due to general rise in property values brought about by the building of the Shasta Project. Of course, as pointed out in the opinion, when the project boundaries are definitely fixed, the land ceases to be "similar land" to land outside of but adjacent to the project, and sales of such outside land made after the announcement of the project are no criteria of the value of the project land.

In conclusion, after reading the appellee's brief,

the question seems to have narrowed itself down to this—conceding that the Government in the exercise of its commerce power, can improve navigable waters in such way as to injure riparian rights without compensation, can it when it exercises the right of eminent domain take property without paying for it the price the owner could get for it if he were to sell it on the market? The answer, it seems to us, is clearly "No." We know no better statement of this than that of the Supreme Court in *Olson vs. United States,* 292 U. S. 246, 255, as follows:

> "Just compensation includes all elements of value that inhere in the property, but it does not excede market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, *but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.*" (Emphasis supplied).

It will be noted that it is the "market value while the property is privately held" which must be considered in determining just compensation. When, therefore, the Government concedes this land had a higher market value than the court allowed, while the property was privately held, we respectfully submit we were denied just compensation when the jury was not allowed to consider that value.

ANSWER TO ARGUMENT OF UNITED STATES OF AMERICA IN SUPPORT OF ITS APPEAL

The statute of the State of Washington provides that as between grantor and grantee taxes shall not become a lien upon real estate until the fifteenth day of February of the year succeeding the year in which they are levied.

The government took possession of and title to the property on December 9th, 1939. As between the grantor and grantee, the taxes levied in 1939 did not become a lien until February 15th, 1940. The Supreme Court of Washington has held that when real estate is condemned, that the condemnee is a grantor within the meaning of the above mentioned statute, and that taxes levied for the year in which property is acquired cannot be paid out of the award since as between grantor and grantee there is no lien upon the property for taxes levied during the year in which the property is taken. *Bethany Presbyterian Church v. City of Seattle,* 154 Wash. 529, 282 Pac. 922.

The Supreme Court of the United States had held that the Federal Constitution does not prohibit states from fixing the time when a tax lien attaches to real property. *United States v. Alabama,* 313 U. S. 274, 85 L. ed. 1327, 61 S. Ct. 1011.

The pertinent parts of Remington's Revised Statutes of Washington, Sec. 11243 (Laws of 1935, p. 68, Sec. 1) are as follows:

> "On the first Monday in January next succeeding the date of levy of taxes the County Auditor shall deliver to the County Treasurer the tax rolls of his county for such assessment year, with

> his warrant thereto attached. . . . The amount of said taxes levied and extended upon said rolls shall be charged to the Treasurer in an account to be designated as Treasurer's 'Tax Roll Account' for ..... and said rolls with the warrants for collection shall be full and sufficient authority for the County Treasurer to receive and collect all taxes therein levied: Provided, That the County Treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the fifteenth day of February following." (For entire section see Appendix p. 19).

Remington's Revised Statutes of Washington, Sec. 11265 provides:

> "The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year." . . . (For entire section see Appendix p. 19).

The Supreme Court of the State of Washington construed the earlier form of that section of the statute last above quoted and in force at the time of the taking of the property in question. The form of the statute when it was construed by the Supreme Court of the State of Washington in *Bethany Presbyterian Church v. City of Seattle,* 154 Wash. 529, 282 Pac. 922, differed from its present form only in that the dates therein set forth are different from the time fixed for the commencement of the lien than are those in the above cited section of the statute which was in effect at the time that property was taken.

In the course of the decision construing the statute, the Supreme Court of Washington said:

"On January 14, 1929, the six months' statutory period, within which the city had the privilege of electing whether it would pay the eminent domain award and take the land or abandon its right to do so, having expired, and the city having failed to expressly so elect, which failure had the effect, in law, of constituting an election by the city to pay the award and take the land (Rem. Comp. Stat., Sec. 9274), the church demanded payment from the city of the full amount of the award. Thereupon a controversy arose between the church, the city and the county as to whether or not the general taxes upon the land levied for the year 1928, amounting to $343.63, should be first paid to the county out of the total award and only the balance thereof paid to the church. * * *

" * * * We conclude that title to the land passed from the church to the city on January 16, 1929.

"When did the taxes for the year 1928 become a lien upon the land as between the church and the city, viewing them as grantor and grantee? In chapter 130, Laws of 1925, Ex. Ses., p. 293 (Rem. 1927 Sup., Sec. 11097-104) relating to assessment, levy, collection and lien of general taxes, we read:

" 'Sec. 104. The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year.'

"This quotation is a reenacted provision of our previously existing statutes. Thus, it becomes plain that, viewing the church and the city as grantor and grantee, title to the land passed from the church to the city on January 16, 1929, without any obligation on the part of the church to

the city to assume or pay the taxes levied upon the land for the year 1928.

"Does the law regard the church and the city as conventional grantor and grantee, as if a voluntary conveyance had been made by the church to the city instead of title to the land passing by virtue of the eminent domain proceeding and payment of the award as therein adjudicated? Our recent decision in *American Creameries Co. v. Armour & Co.*, 149 Wash., 690, 271 Pac. 896, and the authorities therein noticed, we think, are decisive in favor of the church upon this question; that is, that the title passed from the church to the city in legal effect, as from grantor to grantee. * * *

"Did the judgment in the eminent domain proceeding rendered July 5, 1928, award to the county, for the 1928 taxes, any portion of the $9,427.50 awarded for the taking of the land? There is nothing in the record before us so indicating. Indeed, so far as the record here advises us, it does not appear that the county was a party to the eminent domain proceeding in the superior court, or that it asserted any right to any portion of the award until it joined with the city in asking payment to it of the $343.63 in the hands of the clerk of the court. We cannot presume that the judgment award rendered July 5, 1928, adjudicated the right in the county to participate in the award to the extent of the amount of the general taxes against the land for the year 1928, to become payable more than six months thereafter, on the first Monday in February, 1929. Indeed, we think it would have been error, prejudicial to the rights of the church, to have so adjudicated in the judgment making the award, for, as we have seen, the church had the right to an award for the city's taking of the land, undiminshed by the taxes of 1928, which, as between it as grantor and the city as grantee, would not become a lien upon the land until more than six months thereafter, on the second Monday of February, 1929."

Cited with approval in *State ex rel. Oregon-Washington Water Service Co. et al, v. Hoquiam,* 155 Wash. 678, 287 Pac. 670.

That there is no inhibition contained in the United State Constitution which prohibits any state of the Union from fixing the time and conditions under which a lien for taxes shall attach to real property is expressly held in the case of *United States v. Alabama,* 313 U. S. 274, 85 L. ed. 1327, 61 S. Ct. 1011, wherein the court used the following language:

> "There is no question however, as the Government concedes, that the state statute purports to impose a lien as of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. 'It follows the lands in the hands of the vendee, all persons being chargeable with a knowledge of its existence.' *Driggers v. Cassady,* 71 Ala. 529, 534. See, also, *Swann v. State,* 77 Ala. 545; *State v. Alabama Educational Foundation,* 231 Ala. 11, 16, 163 So. 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme. * * * "
>
> "The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and

> making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. * * *."

The Supreme Court of the United States in *Magruder v. Supplee,* decided May 25, 1942, 86 Law Edition Advance Opinions No. 15, p. 1025, speaking with reference to the deductability of taxes by an income tax payer said:

> "Resort must be had here to the laws of Maryland and of the City of Baltimore to determine upon whom the state and city real estate taxes were imposed."

Applying the rules announced in these cases to the instant facts we find this. The 1939 taxes in the sum of $3,003.96 became a lien on the land on January 1, 1939. On December 9, 1939, the United States acquired title in fee simple absolute (T. of R. p. 21) by filing a declaration of taking, setting forth the nature of the estate taken and depositing the estimated value of the property in court (Title 40, U.S.C.A., Sec. 258a). The Government deposited the sum of $7,950.35 for the tract involved here. The Government and The Washington Water Power Company then stipulated as follows:

> "It is Hereby Stipulated by and between the plaintiff and the defendant, The Washington Water Power Company, for the purposes of this case only:
>
> * * * * *

"5. That the lands of the defendant, The Washington Water Power Company, being condemned in this proceeding, have a reasonable value for agricultural, grazing and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the Court by the plaintiff as the estimated value of the said tract of land, to-wit: the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars ($7,950.35).

"6. That should the Court hold that evidence of power site values is inadmissible then it is stipulated and agreed that what severance damages, if any, the said defendant, The Washington Water Power Company, has suffered to the remainder or unappropriated portion of its holdings are included in the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars ($7,950.35) *and the award to the defendant should be the said sum of Seven Thousand Nine Hundred Fifty and* 35/100 *Dollars* ($7,950.35). * * * " (T. of R. pp. 43, 45, 46).

Since under the Bethany Church case, The Washington Water Power Company was a grantor on December 9, 1939, against whom no lien had accrued, it was entitled to the full agricultural and stipulated value, $7,950.35. As to the taxes which were a lien against the property, the Government could have elected to take an imperfect title, as in the Alabama case, and the Counties could not have enforced their lien, or it could take a fee simple title and make the Counties parties to the condemnation suit, which it did. In this latter event, it obligated itself to pay the tax lien just as any other grantee seeking to obtain a fee simple title on December 9, 1939, for in no other way could the fee simple title pass.

CONCLUSION

We respectfully urge, therefore, that this case should be reversed on the appeal of The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, with instructions to submit to a jury the question of power site value, and should be affirmed on the Government's appeal.

Respectfully submitted,

ALAN G. PAINE,

H. E. T. HERMAN,

Attorneys for The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, Appellants and Appellees.

POST, RUSSELL, DAVIS & PAINE,
Spokane, Washington,
Of Counsel.

APPENDIX

Remington's Revised Statutes of Washington, Sec. 11243:

Rolls Delivered to Treasurer — Charged With Amount—On the first Monday in January next succeeding the date of levy of taxes the county auditor shall deliver to the county treasurer the tax rolls of his county for such assessment year, with his warrant thereto attached, authorizing the collection of said taxes, taking his receipt therefor, and said books shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's 'Tax Roll Account' for ..... of said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: *Provided,* That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the fifteenth day of February following. (L. '35, p. 68, Sec. 1).

Remington's Revised Statutes of Washington, Sec. 11265:

Life of Lien—Between Grantor and Grantee—Lien of Personalty Tax—Following Property—Personalty Lien on Realty—The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are

levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year. The taxes assessed upon each item of personal property assessed shall be a lien upon such personal property from and after the date upon which the same is listed with and valued by the County Assessor, and no sale or transfer of such personal property shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon each item of personal property of the person assessed, distrained by the Treasurer as provided in section 86 of this act, from and after the date of the distraint and no sale or transfer of such personal property so distrained shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon the real property of the person assessed, selected by the County Treasurer and designated and charged upon the tax rolls as provided in section 112 of this act, from and after the date of such selection and charge and no sale or transfer of such real property so selected and charged shall in any way affect the lien for such personal property taxes upon such property. (L. '39, ch. 206, Sec. 45, p. 766, amending L. '35, Ch. 30, Sec. 7).